IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AVIS RENT A CAR SYSTEM, LLC, and AVIS BUDGET GROUP, INC. Plaintiffs, v. ACE PROPERTY & CASUALTY INSURANCE COMPANY, Defendant.	Civil Action No. ____________ Electronically Filed

COMPLAINT FOR DECLARATORY JUDGMENT
AND DEMAND FOR JURY TRIAL

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Attorneys for Plaintiffs
Avis Rent A Car System, LLC and Avis Budget Group, Inc.

Plaintiffs Avis Rent A Car System, LLC and Avis Budget Group, Inc. (jointly, "Avis"), by and through their attorneys, Dughi, Hewit & Domalewski, P.C. and Covington & Burling, LLP, for their Complaint for Declaratory Judgment against Defendant ACE Property & Casualty Insurance Company, with knowledge as to their own actions and events, and upon information and belief as to other matters, allege as follows:

THE PARTIES' ADDRESSES

1. Pursuant to Local Civil Rule 10.1, the address of the principal place of business of each party is as follows:

A. Avis Rent A Car System, LLC: 6 Sylvan Way, Parsippany, NJ 07054

B. Avis Budget Group, Inc.: 6 Sylvan Way, Parsippany, NJ 07054

C. ACE Property & Casualty Insurance Company: 436 Walnut St., WA06T, Philadelphia, PA 19106.

NATURE OF LAWSUIT

2. This is a civil action for declaratory relief arising out of Defendant's disclaimer of coverage under a commercial umbrella liability policy issued to Avis for two underlying personal injury lawsuits (the "Underlying Lawsuits"). One of the Underlying Lawsuits recently was tried, and a jury returned a verdict of

$23,500,000 against the Plaintiffs. The second Underlying Lawsuit is scheduled for trial on February 27, 2017.

3. Avis seeks, *inter alia*:

(a) a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that Defendant is obligated to provide coverage for the amount of any final judgment entered in, or settlement of, the Underlying Lawsuits in excess of an applicable self-insured retention of $2,000,000; and

(b) other relief, including attorneys' fees, costs of suit and prejudgment interest, caused by Defendant's ongoing refusal to acknowledge its obligation to provide coverage to Avis for the Underlying Lawsuits, which has necessitated the filing of this action.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a). The parties are of diverse citizenship, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

5. This Court has personal jurisdiction over the Defendant because, within the relevant time period, the Defendant has been licensed to do business in New Jersey; has transacted substantial business in New Jersey; has insured assets, liabilities, and risks located in New Jersey, including those of the Plaintiffs; and/or otherwise has sufficient contacts with New Jersey.

6. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2) and (3).

THE PARTIES

7. Plaintiff Avis Rent A Car System, LLC ("Avis Rent A Car") is a limited liability corporation organized under the laws of Delaware, with its principal place of business in Parsippany, New Jersey. Avis Rent A Car is engaged in the business of providing rental car services throughout the United States.

8. Plaintiff Avis Budget Group, Inc. ("ABG") is a corporation organized under the laws of Delaware with its principal place of business in Parsippany, New Jersey. ABG is the corporate parent of Avis Rent A Car. ABG is a global provider of car rental services through its Avis and Budget brands, and has more than 10,000 rental car locations worldwide.

9. Plaintiffs are collectively referred to in this Complaint as "Avis."

10. Defendant ACE Property & Casualty Insurance Company ("ACE") is a corporation organized under the laws of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. ACE is licensed to do business in New Jersey and, at all relevant times, was engaged in the business of selling insurance policies and other insurance products in New Jersey.

THE RELATIONSHIP BETWEEN AVIS AND CSYG

11. Avis is a leading global provider of vehicle rental services. Some of its rental car locations in the United States are owned and operated by independent contractors.

12. One of Avis's independent contractors is CSYG, Inc. ("CSYG"). On or about December 1, 2011, Avis Rent A Car and CSYG entered into an "Independent Operator Agreement" ("Agreement") governing CSYG's operation of a rental car facility, including a license to operate the CSYG facility under the Avis banner, located at 143 Courtland Street, Atlanta, GA 30303 (the "CSYG Facility" or "Facility").

13. The Independent Operator Agreement stated, among other things, that:

a. CSYG was an independent contractor whose employees are not employees of Avis (Agreement ¶ 2(a)-(c));

b. CSYG was responsible for hiring, training, compensating, and setting work schedules for its employees at the CSYG Facility (*Id.* ¶ 2(b));

c. CSYG was responsible for staffing the Facility with "uniformed, competent and trained employees who are capable of conducting the Business" (*Id.* ¶ 4(a)(4));

d. CSYG would "park, safe keep, wash, clean, fuel, and, as necessary, locally shuttle" Avis vehicles available for rent at the CSYG Facility, and report and reconcile "[a]ll vehicles that are overdue, missing or stolen" (*Id.* ¶ 4(e)-(f)); and

e. CSYG would "perform a driver's license check on all employees" engaged in a permissive use of an Avis vehicle, such as pick up and drop off services, and would not allow any CSYG employee to operate an Avis vehicle if motor vehicle records indicated that the employee had an "expired, invalid, suspended or revoked license." (*Id.* ¶ 4(o)).

14. The Agreement also required CSYG to maintain Commercial General Liability coverage of at least $1,000,000 naming Avis as an additional insured. (*Id.* ¶ 4(n)). CSYG also promised to:

> defend, indemnify and hold harmless [Avis Rent A Car and ABG] from and against any and all claims, liabilities, demands, losses, suits, penalties, fines, judgments and costs, including legal costs and expenses and reasonable attorney's fees, allegedly arising directly or indirectly from the condition of the [CSYG Facility] and/or any willful or negligent act or omission (including the failure to follow [Avis's] instructions) done or suffered by [CSYG] or its employees, or by [CSYG's] contractors or vendors arising from the Business at the [Facility].

(*Id.* ¶ 10.)

15. For its part, Avis agreed, *inter alia*, to furnish CSYG with rental vehicles from the Avis fleet, to provide Avis uniforms, rental agreement forms and

additional driver forms to CSYG, and to pay CSYG a fixed percentage commission on the revenue derived from each rental transaction. (*Id.* ¶ 3(a), (g), (h), and Schedule A.)

16. Upon information and belief, CSYG employed Byron Devon Perry to wash and park rental cars at the CSYG Facility. At the time he was hired, Mr. Perry did not have a valid driver's license. He also had a criminal record, including three prior felony convictions.

17. On the night of August 23, 2013, after the CSYG Facility had closed, Mr. Perry allegedly re-entered the Facility and stole a Ford Edge rental car. Shortly after midnight on August 24, Mr. Perry lost control of the vehicle and struck two women—Adrienne Smith and Brianna Johnson—as they sat talking on a brick wall at 824 Peebles Street, Atlanta, Georgia. Mr. Perry fled the scene on foot, but was arrested on August 28, 2013, and was charged with nine criminal counts, including hit-and-run offenses. He is currently incarcerated.

18. Adrienne Smith subsequently sued CSYG, Byron D. Perry, Avis, and two individuals employed by CSYG and Avis, seeking damages for serious bodily injuries she sustained in the hit and run incident. *Adrienne Danielle Smith v. Avis Rent A Car System, LLC, et al.*, No. 14-C-00798-S4 (Ga. Cir. Ct., Gwinnett County) (the "Smith Lawsuit"). Smith alleged claims of negligence and *respondeat superior* against Avis. She specifically alleged that Perry was an

employee of Avis and CSYG; that CSYG was an employee or agent of Avis; that at the time of the hit and run incident, Perry was operating the vehicle within the course and scope of his employment; that Avis was negligent in the hiring, training, supervision, and retention of Perry as an employee, as well as vicariously liable for CSYG's negligence; and that Avis and CSYG negligently permitted Perry to access and use rental vehicles, including the Ford Edge involved in the incident. Avis denied all allegations of liability.

19. Brianna Johnson also sued Avis and the same defendants seeking damages for bodily injuries she sustained in the incident. *Brianna Johnson v. Avis Rent A Car System, LLC, et al.*, No. 15-C-04651-4 (Ga. Cir. Ct., Gwinnett County) (the "Johnson Lawsuit"). The claims and allegations against Avis in the Johnson Lawsuit are substantially the same as those in the Smith Lawsuit. Avis denied all allegations of liability. The Smith Lawsuit and the Johnson Lawsuit are referred to collectively herein as the "Underlying Lawsuits."

20. The Smith Lawsuit was tried to a jury from January 23, 2017 through February 3, 2017. On February 3, 2017, the jury in the Smith Lawsuit rendered a verdict in favor of Smith and awarded her $47 million in compensatory damages. The jury specifically found that CSYG was an "employee" of Avis rather than an independent contractor, and apportioned the damages and fault among the defendants as follows: 33% to Byron Perry, 15% to CSYG, 50% to Avis, and 1%

each to the two individual plaintiffs. The jury awarded punitive damages against defendant Byron Perry but declined to award punitive damages against any other defendant.

21. The Johnson Lawsuit is scheduled for trial on February 27, 2017.

THE ACE UMBRELLA POLICY

22. Avis purchased from ACE a Commercial Umbrella Liability Policy, No. G2705206A, with an effective period of July 1, 2013 to July 1, 2014 (the "Umbrella Policy").

23. The Umbrella Policy obligates ACE to "pay on behalf of [Avis] those sums in excess of the 'retained limit' that [Avis] becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." The Policy applies to claims alleging bodily injury "caused by an occurrence," which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Umbrella Policy § I (Insuring Agreements), § VII (Definition O)).

24. The injuries allegedly sustained by Smith and Johnson in the August 24, 2013 hit and run incident were caused by an "occurrence" and any liability imposed on Avis in the Underlying Lawsuits is covered by the ACE Umbrella Policy. The "retained limit" applicable to the Underlying Lawsuits is $2 million

"each occurrence," which must be borne by Avis before the ACE Umbrella Policy responds to an underlying claim or loss.

25. The Umbrella Policy specifically covers vicarious liability for bodily injuries imposed upon Avis as a result of negligent acts and omissions of contractors or their employees involving Avis-branded vehicle rental facilities, including the CSYG Facility.

26. All conditions and requirements imposed on Avis by the ACE Umbrella Policy, including payment of premiums and notices of claims, have been satisfied and/or have been waived and/or are subject to an estoppel against Defendant ACE.

THE COVERAGE DISPUTE

27. When the Underlying Lawsuits were filed against Avis, they were classified as Independent Contractor claims and tendered to CSYG pursuant to the indemnity provisions in paragraph 10 of the Agreement. CSYG, in turn, tendered the Underlying Lawsuits to its liability insurer, under a CGL policy that also listed Avis as an insured.

28. The Underlying Lawsuits proceeded through discovery and dispositive motions practice. On January 18, 2017, the court in the Smith Lawsuit denied Avis' motion for summary judgment. Although it was undisputed that Avis did not operate the CSYG Facility at the time of the August 23-24, 2013 incident,

and that CSYG was solely responsible under the Independent Contractor Agreement for operating and securing the Facility on a daily basis and hiring and training its employees, the court found triable issues of material fact as to whether Avis was nonetheless subject to vicarious liability, based on an agency or employment theory, for CSYG's alleged negligence in failing to secure the Facility and hiring Mr. Perry.

29. On January 19, 2017, with trial scheduled on a legal theory Avis had considered meritless, Avis's claims agent notified ACE of the Underlying Lawsuits under the Umbrella Policy. The notice included a detailed report prepared by defense counsel summarizing the facts, injuries, claims, and relevant issues involved in the Smith Lawsuit, and a summary of the plaintiff's settlement demand. Defense counsel also requested a continuance of the trial to enable Avis to pursue settlement negotiations, but the request was denied.

30. The Umbrella Policy permits ACE, at its own expense, "to participate in the defense of any 'suit' and the investigation of any claim to which this policy may apply." (Umbrella Policy, Rev. Endorsement 13.) ACE did not invoke this provision in response to Avis's notice.

31. Trial of the Smith Lawsuit commenced on January 23, 2017. During the course of the ten-day trial, representatives of Avis had multiple communications with ACE claim representatives, and kept ACE apprised of the

progress of the trial. Nevertheless, ACE did not send a representative to attend the trial, did not participate in Avis's defense, did not communicate with Avis's defense counsel during the trial, and did not participate in settlement negotiations before or during trial. ACE also did not issue a reservation of rights letter with respect to either of the Underlying Lawsuits.

32. On February 3, 2017, the same day the jury rendered its verdict in the Smith Lawsuit, ACE sent a four-sentence email to Avis disclaiming coverage for the Smith Lawsuit under the Umbrella Policy. It stated that "under GA law Chubb is allowed to deny coverage for late notice under [the Umbrella Policy], and denies coverage for this claim accordingly."

33. Avis was defended by competent counsel throughout the course of litigation and trial of the Smith Lawsuit, and throughout the litigation of the Johnson Lawsuit, and will be competently defended during the trial and/or settlement of the Johnson Lawsuit.

34. ACE was not prejudiced as a result of any alleged late notice of the Smith Lawsuit and Johnson Lawsuit.

35. ACE has informed Avis that it intends to disclaim coverage as well under the Umbrella Policy for the Johnson Lawsuit, which is set for trial on February 27, 2017.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment: Underlying Smith Lawsuit)

36. Avis repeats and incorporates by reference the allegations set forth in Paragraphs 1 through 35.

37. Avis asserts a claim for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Avis seeks a judicial determination of the rights and duties of the parties with respect to an actual controversy arising out of the Umbrella Policy and the obligations of Defendant ACE to indemnify Avis for any final judgment entered in, or settlement of, the Underlying Smith Lawsuit. The controversy is of sufficient immediacy and magnitude to justify issuance of declaratory relief by this Court.

38. Defendant ACE has a duty under the Umbrella Policy to pay on behalf of Avis any damages that are awarded against Avis by final judgment in the Underlying Smith Lawsuit, or the amount of any settlement that may be negotiated between Avis and the plaintiff in that Lawsuit, to the extent such judgment or settlement exceeds the applicable retention of $2 million.

39. ACE has denied that it has any obligation under the Umbrella Policy to pay any damages that are awarded against Avis by final judgment in the Smith Lawsuit or the amount of any settlement that may be negotiated between Avis and the underlying plaintiff.

40. Avis provided timely written notice to ACE of the Smith Lawsuit under the circumstances. In the alternative, ACE was not appreciably prejudiced by the timing of Avis's notice, in that: (a) no substantial rights of ACE were irretrievably lost; (b) ACE deliberately refrained from participating in Avis's defense, attending the Smith trial, pursuing settlement discussions with Smith, or otherwise taking any action on behalf of Avis from January 19, 2017 through the present, including during the ten-day period when trial was in progress; and (c) ACE cannot demonstrate that the outcome of the Smith trial would have been different had ACE received earlier notice of that lawsuit.

41. An actual controversy of a justiciable nature presently exists between Avis and ACE concerning the proper construction and application of the Umbrella Policy and the rights and obligations of the parties thereto with respect to the Smith Lawsuit.

42. The issuance of declaratory relief by this Court with respect to the nature and extent of ACE's duty to provide coverage under the Umbrella Policy for the Smith Lawsuit will terminate some or all of the existing controversy between the parties.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment: Underlying Johnson Lawsuit)

43. Avis repeats and incorporates by reference the allegations set forth in Paragraphs 1 through 42.

44. Avis asserts a claim for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Avis seeks a judicial determination of the rights and duties of the parties with respect to an actual controversy arising out of the Umbrella Policy and the obligations of Defendant ACE to indemnify Avis for any adverse judgment that may be entered in, or any settlement of, the Underlying Johnson Lawsuit. The controversy is of sufficient immediacy and magnitude to justify issuance of declaratory relief by this Court.

45. Defendant ACE has a duty under the Umbrella Policy to pay on behalf of Avis any damages that may be awarded against Avis by final judgment in the Underlying Johnson Lawsuit, or the amount of any settlement that may be negotiated between Avis and the plaintiff in that Lawsuit.

46. Defendant ACE has denied that it has any obligation under the Umbrella Policy to pay any damages that may be awarded against Avis in the Johnson Lawsuit or the amount of any settlement that may be negotiated between Avis and the underlying plaintiff.

47. Avis provided timely written notice to ACE of the Johnson Lawsuit under the circumstances. In the alternative, ACE was not appreciably prejudiced by the timing of Avis's notice, in that: (a) no substantial rights of ACE have been irretrievably lost, and (b) ACE has deliberately refrained from participating in Avis's defense, pursuing settlement discussions with Johnson, or otherwise taking

any action on behalf of Avis from January 19, 2017 through the present; and (c) ACE retains the ability to participate in Avis's defense in the upcoming Johnson trial and to negotiate and fund a settlement of the Johnson Lawsuit on behalf of Avis.

48. An actual controversy of a justiciable nature presently exists between Avis and ACE concerning the proper construction and application of the Umbrella Policy and the rights and obligations of the parties thereto with respect to the Johnson Lawsuit.

49. The issuance of declaratory relief by this Court with respect to the nature and extent of ACE's duty to provide coverage under the Umbrella Policy for the Johnson Lawsuit will terminate some or all of the existing controversy between the parties.

DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand a jury trial as to all issues so triable as a matter of right, pursuant to Federal Rules of Civil Procedure 38(b)(1) and 38(c).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Avis prays for relief as follows:

1. On its First Claim for Relief, Avis asks the Court to enter judgment:

(a) declaring that Defendant ACE, pursuant to the terms of the Umbrella Policy, is obligated to pay on behalf of Avis any damages that are awarded against Avis by final judgment in the Underlying Smith Lawsuit, or the amount of any settlement that may be negotiated in that Lawsuit, to the extent such judgment or settlement exceeds the applicable retention of $2 million;

(b) awarding the attorneys' fees and costs that Avis has incurred and will continue to incur in bringing this action, pursuant to New Jersey Court Rule 4:42-9(a)(6) and other applicable law; and

(c) awarding such other and further relief as the Court deems just and proper.

2. On its Second Claim for Relief, Avis asks the Court to enter judgment:

(a) declaring that Defendant ACE, pursuant to the terms of the Umbrella Policy, is obligated to pay on behalf of Avis any damages that may be awarded against Avis in the Underlying Johnson Lawsuit, or the amount of any settlement that may be negotiated in that Lawsuit;

(b) awarding the attorneys' fees and costs that Avis has incurred and will continue to incur in bringing this action, pursuant to New Jersey Court Rule 4:42-9(a)(6) and other applicable law; and

(c) awarding such other and further relief as the Court deems just and proper.

VERIFICATION

Russell L. Hewit, certifies under penalty of perjury as follows: that he is an attorney of the State of New Jersey and an attorney for Avis; that the factual allegations in the foregoing Complaint are true and correct to his knowledge, except as to matters therein stated to be alleged upon information and belief and as to those matters, he believes them to be true; and that the grounds of his knowledge as to all matters not stated upon his knowledge are records.

Russell L. Hewit

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RULE 11.2 CERTIFICATION

I hereby certify under penalty of perjury that the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

DATED: February 16, 2017

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